IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 4 & 5 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT (DKT. NO. 2033)

Summary judgment should be granted on Plaintiffs' public and private state-law and federal common law nuisance claims (Counts 4 & 5).[1] As detailed *infra*, the relevant facts for each inquiry are undisputed and ripe for judgment as a matter of law.[2] Although *Plaintiffs' Opposition to Defendants' Joint Motion*, Dkt. No. 2119 (May 29, 2009) ("Opposition" or "Opp."), conflates certain issues by virtue of its restructured order and citations to inapposite authority, the governing law on each of these points is clear.

I. Arkansas Law Must Apply To Conduct Occurring In Arkansas

Plaintiffs' attempt to apply Oklahoma law to conduct occurring in Arkansas is contrary to the Supreme Court's jurisprudence. The dormant Commerce Clause forbids Oklahoma from regulating economic activity occurring in neighboring States. Plaintiffs protest that this rule should be set aside because the use of poultry litter by Arkansas farmers allegedly has effects in Oklahoma, but the Supreme Court has made clear that the Commerce Clause precludes the application of a State's law "to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[3] This is particularly true in light of the fact that Arkansas has enacted laws that specifically and comprehensively regulate the use of poultry litter in Arkansas—laws that Plaintiffs ask the Court to set aside in favor of applying Oklahoma law. The dormant Commerce Clause protects against inconsistent legislation arising

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[1] *See also Defendants' Joint Motion for Summary Judgment on Counts 4 & 5*, Dkt. No. 2033 (May 11, 2009) ("Motion" or "Mot.").

[2] In numerous instances, Plaintiffs incorrectly argue that the burden of proof should be shifted to Defendants to disprove elements of the nuisance claims. *See, e.g.*, Opp. at 6 ¶19, 20 n.14 (arguing that Defendants must provide evidence of each transfer of poultry litter used by Non-Growers); *id.* at 3 ¶8, 24 (arguing that Defendants must prove that each application of poultry litter complies with all regulations and laws). The law requires that Plaintiffs—not Defendants—satisfy the burden of proof with respect to each element of the claim. *See Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *supra* at 5-6 n.18, 7 n.24.

[3] *Healy v. Beer Institute*, 491 U.S. 326, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)); *see also Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005); *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 746 (9th Cir. 2001); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995).

from the projection of one State's regulatory regime into the jurisdiction of another State.[4]

II. Land Application Of Poultry Litter As A Fertilizer Is Not A Nuisance *Per Se*

A nuisance *per se* "is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings."[5] Despite quoting this same standard, Plaintiffs contradict themselves by asserting that "[t]he land application *in the IRW* is a nuisance 'at all times and under any circumstances, regardless of location or surroundings.'" Opp. at 16 (emphasis in original); *id.* at 15 ("Given the geology and conditions of the IRW, land application of [poultry litter] … is a nuisance *per se*."). Plaintiffs' claim—which is based on the location ("in the IRW") and surroundings ("given the geology and conditions of the IRW") where the activity takes place—clearly alleges the existence of a nuisance *per accidens*, not a nuisance *per se*. *See* Mot. at 8; *see also id.* at 2-3 ¶¶3-5 (poultry litter is a beneficial fertilizer).[6]

III. Plaintiffs Cannot Pursue A Cause Of Action For *Private* Nuisance

The elements of private nuisance require Plaintiffs to demonstrate a possessory property interest in the waters in the Oklahoma portion of the IRW running in definite streams and interference with the State of Oklahoma's *private* use and enjoyment of the same. *See* Mot. at 9-11; Opp. at 12-14. Plaintiffs cannot satisfy either of these requirements as a matter of law.

A. The Cherokee Nation, Not the State of Oklahoma, Owns the Waters at Issue

As detailed in Defendants' motion to dismiss pursuant to Rule 19, the Cherokee Nation—

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[4] *See supra* at 1 n.3; *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 379 (7th Cir. 1998); *see also Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 487, 494-95 (1987) (concluding, in the context of point source discharges under the Clean Water Act, that courts must apply the laws of the State in which alleged pollution originated in evaluating common law claims about interstate water pollution).

[5] *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n.6 (Okla. 1991); *see* Mot. at 8.

[6] In the present motion, Defendants do not request dismissal of Count 7 (based on 27A Okla. Stat. § 2-6-105), which is addressed separately in Dkt. No. 2057. Instead, Defendants merely request dismissal of Plaintiffs' allegations with respect to the existence of a nuisance *per se*, as defined by *Sharp*, pursuant to which Plaintiffs seek to avoid their burden of proving that the land application of poultry litter does in fact cause or is likely to cause a nuisance.

not the State of Oklahoma—is the sovereign owner and trustee of the waters, streambanks and sediments in the Oklahoma portion of the IRW. *See* Dkt. No. 1788 at 4-14; Dkt. No. 1825.[7] Because Plaintiffs' do not maintain a possessory property interest in such waters, their private nuisance claim must be dismissed.[8] *See* Mot. at 9-10.

B. Plaintiffs Cannot Demonstrate *Private* Use and Enjoyment of Public Waters

No matter who owns the waters, Plaintiffs' private nuisance claim fails because of their inability to demonstrate any interference with the State's "private use and enjoyment" of the property, as distinct from any injury to the public's use and enjoyment thereof. Restatement (Second) of Torts § 821D; Mot. at 10-11 (citing Oklahoma and Arkansas authority). Although Plaintiffs recognize this same standard, they do not identify any private use and enjoyment of the waters by the State. *See* Opp. at 12-14.[9] Moreover, Plaintiffs fail to identify a single instance in which a government entity has asserted a valid cause of action for private nuisance based on allegations of harm to public waters. *See* Opp. at 13-14.[10] Plaintiffs' failure is not surprising, as

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[7] Plaintiffs incorrectly assert that "the Court [has] recognized" that "the State has [possessory title or ownership interests] in the waters of the IRW flowing in definite streams." Opp. at 12 (citing Dkt. No. 1435 (Jan. 7, 2008)). The January 7, 2008 Order in no way affirmed the State's ownership of such waters, and instead merely ruled on the sufficiency of Plaintiffs' *allegations*. *See id.*; *Realmonte v. Reeves*, 169 F.3d 1280, 1283 (10th Cir. 1999) (court must accept well-pleaded factual allegations as true and view them in a light most favorable to the plaintiff); June 15, 2007 Hearing Tr. at 176:11-22 (Mot. Ex. 1). No substantive ruling has been entered in this case with respect to the ownership rights of either the Cherokee Nation or the State of Oklahoma.

[8] Plaintiffs claim that the Cherokee Nation's interest are "of no moment as, for the purposes of this lawsuit, the Cherokee Nation has assigned to the State whatever claims it may have against Defendants." Opp. at 13 n.6. This argument is incorrect. For several reasons, the purported Agreement between the Attorney General and the Cherokee Nation cannot validly assign the Cherokee Nation's interests. This issue will be discussed in the Reply to be filed in support of *Defendants' Joint Motion for Summary Judgment on Counts 6 & 10* (Dkt. No. 2055).

[9] To the contrary, Plaintiffs have repeatedly asserted that the alleged injury is to the "public welfare." *Id.* at 14; Dkt. No. 1917 at 15-16 ("[T]he State is seeking damages and other relief [in Count 4] for … public rights, not private rights."). In any event, even if Plaintiffs could show some *private* use and enjoyment of the public waters, such a claim must be dismissed in accordance with the applicable statute of limitations. *See id.* at 8-9; Dkt. No. 1876 at 18.

[10] Each of the cases Plaintiffs cite pertain to claims of public—not private—nuisance. *See Selma*

the Restatement expressly notes that one can never substantiate a claim of private nuisance with respect to public waters.[11] As a result, Plaintiffs' private nuisance claim must be dismissed.

IV. Plaintiffs' Public Nuisance Claim Should Be Dismissed In Whole Or In Part

A. As in the *Lead Paint* Cases, Defendants Do Not Control the Specific Decisions of How, When and Where the Product Is Applied

Defendant's "control" of the specific nuisance-causing activity must be established for any nuisance claim. *See* Mot. at 11-13.[12] Yet Plaintiffs do not identify any facts or authority to satisfy their burden to prove that Defendants' control any farmer's use of poultry litter as a fertilizer within the IRW. *First*, Plaintiffs' unsupported assertion that "growers are Defendants' employees/agents" is demonstrably false.[13] Opp. at 16, 16-17 n.11. Tellingly, Plaintiffs do not offer any substantive discussion of this point. Moreover, Plaintiffs' alleged evidence of control relates solely to the process of growing poultry, *see, e.g.*, Opp. at 3-4 ¶9, 5 ¶¶15-18; Mot. at 5-6 ¶¶15-18, and not to the myriad and wholly separate activity and decisions about whether to use poultry litter, when, where and how to apply it, and in what amounts. *See* Mot. at 14-16. *Second*, Plaintiffs do not identify a single authority to support a claim of public nuisance based on an independent contractor's separate use, sale or transfer of a product within that contractor's

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Pressure Treating, 221 Cal. App. 3d at 1615 (Cal. Ct. App. 1990); *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087, *29 (Oct. 31, 2008 D. V.I.). Further, although Plaintiffs repeatedly seek to conflate the issues, the availability of monetary damages under public nuisance has no bearing on the viability of Plaintiffs' private nuisance claim. *See infra* at 7-9.

[11] *See* Restatement (Second) of Torts § 821D cmt. c ("The uses that members of the public are privileged to make of public … rivers and lakes, are 'public' as distinguished from 'private.'"); *see also New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1235 (D. N.M. 2004) ("the law of *public nuisance* redresses injuries to common rights belonging to the public").

[12] Plaintiffs' attempt to distinguish *Burlington Northern* is inapposite, and does not address the remaining authority establishing this long-standing requirement of nuisance law. *See* Opp. at 17.

[13] Growers are independent contractors—not employees—as evidenced by both the "nature of the contract," *Page v. Hardy*, 334 P.2d 782, 784 (Okla. 1958); *see, e.g.*, Mot. Exs. 30-35, and the details of their occupation, *Page*, 334 P.2d at 784-85 (listing factors).

ownership and control. *See* Opp. at 16-18.[14] Plaintiffs' attempt to expand nuisance law to hold Defendants liable for such separate and independent conduct must be rejected.[15]

Alternatively, Plaintiffs assert that Defendants should be held liable for the conduct of their independent Contract Growers pursuant to Restatement (Second) of Torts § 427B. For the reasons set forth in Dkt. No. 2185 at 2-10 (June 5, 2009), Section 427B cannot establish the requisite control necessary to pursue a public nuisance claim.

Finally, approximately 50 percent of poultry litter used as fertilizer in the IRW is land applied by farmers, ranchers and others that have no contractual relationship with any Defendant ("Non-Growers"), but instead use poultry litter obtained in the marketplace. *See* Mot. at 6 ¶19.[16] Plaintiffs do not identify any authority whereby Defendants can be held liable for the actions of these Non-Growers—which include, among numerous others, the State itself.[17] At a minimum, summary judgment is proper with respect to the conduct of these Non-Growers.[18]

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[14] Rather than identify authority to support their theory, Plaintiffs try to distinguish the analogous circumstances presented in the *Lead Paint* cases. *See In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *Rhode Island v. Lead Indus. Ass'n, Inc.* ("*LIA*"), 951 A.2d 428 (R.I. 2008). Plaintiffs mistakenly claim that the holding regarding lead paint manufacturers' lack of control was somehow premised upon a lack of "interference with a 'public right,'" Opp. at 17, when in reality the courts' discussion of that issue constituted a separate finding unrelated to the issue of "control," *see, e.g.*, *LIA*, 951 A.2d at 453. Plaintiffs also attempt to limit, without support, the scope of the *Lead Paint* holdings to apply only to the sale of new products. *See* Opp. at 18. This distinction ignores the fact that the alleged nuisance-causing activity was not the manufacture or sale of a new product, but the individual ways in which the product was used and maintained. These same circumstances are present here. Poultry litter is a useful commercial product. *See* Mot. at 2-3 ¶¶3-5. Plaintiffs' dispute is not with poultry litter as a product, but with how it is allegedly used in individual applications (although Plaintiffs offer no evidence of instances of improper use). Accordingly, the *Lead Paint* cases are instructive in this case.

[15] *See, e.g., In re Lead Paint Litig.*, 924 A.2d at 494.

[16] *See also* Dkt. No. 2183 at ¶10 n.19 (citing *inter alia* Dkt. No. 2183 Ex. 2 at 57-58 ("[a] review of the 2008 PFO Registry data from operators located in the IRW … Benton and Washington counties shows that … 65% of all the poultry manure [was] either transferred or sold").

[17] *See* Dkt. No. 2069 at 9 ¶25 (documenting the State's use of poultry litter as a fertilizer within the IRW); Dkt. No. 2183 at 13 ¶25.

[18] Plaintiffs improperly attempt to shift their burden of proof to Defendants on this point. *See*

B. Land Application of Poultry Litter Authorized By and Performed in Compliance with State Law Cannot Constitute a Nuisance

The long-standing legal doctrine whereby "[n]othing … done or maintained under the express authority of a statute can be deemed a nuisance" expressly shields parties from liability resulting from the performance of an activity in accordance with state regulations. Mot. at 17-20 (quoting 50 Okla. Stat. § 4).[19] While Plaintiffs are correct that a party authorized to perform a general activity may not do so in a manner as to constitute a nuisance,[20] this principle is inapplicable where (as here) the regulations set forth specific instructions detailing actions that may be taken in accordance with the law. *See* Mot. at 3-4 ¶¶6-8.[21]

Accordingly, the sole issue to be determined is whether the Animal Waste Management Plans (AWMPs) and Nutrient Management Plans (NMPs) that are drafted, approved and issued by state agents pursuant to Oklahoma's and Arkansas' comprehensive poultry litter laws constitute legal authorization for the application of poultry litter in conformance with the specific instructions contained therein. As detailed in *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8*, Dkt. No. 2057 (May 18, 2009),[22] these site-specific instructions are not mere

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Opp. at 6 ¶19, 20 n.14. As detailed above, Plaintiffs—not Defendants—must prove the specific amounts of poultry litter applied for which Defendants may be held liable. *See supra* at 1 n.2. Because Defendants cannot be liable for the actions of Non-Growers, Plaintiffs must tailor their evidence and claims to exclude reference to this conduct.

[19] Plaintiffs are wrong in arguing that "regulated industries cannot be held liable for the nuisances they cause." Opp. at 20; *see* Mot. at 17-20; *see, e.g.*, *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (*en banc*) (public water utility regulations); *E.I. du Ponte de Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915) ("regulat[ing] business of manufacturing, handling, or storing [explosives]"); *McKay v. City of Enid*, 109 P. 520, 521 (Okla. 1910) (railroad industry regulations).

[20] *See* Opp. at 21, 23. For example, laws authorizing installation of a railroad do not authorize its construction according to specifications creating a public nuisance. *See McKay*, 109 P. at 521.

[21] In relying upon authority permitting private individuals to recover damages based on a state-authorized nuisance, *see* Opp. at 21, 23, Plaintiffs wholly ignore the analysis explaining why private individuals—but not the State—can recover such damages. *See* Mot. at 20-21 n.22.

[22] This issue will be also discussed at length in the Reply to be filed in support of this motion.

"guidance" that a farmer can choose to follow or not at their discretion. *See id.* at 16-24. Instead, these plans are required permits, which the state issues and mandates strict compliance with the instructions contained therein. *See id.*[23] Because Plaintiffs have not identified any specific violations of these plans,[24] Plaintiffs' public nuisance claim must be dismissed.[25]

C. Remedy for Plaintiffs' Public Nuisance Claim Must Be Limited to Abatement Only

Plaintiffs in no way dispute the long-standing common law rule that civil remedies for public nuisance must generally be limited to abatement only. *See* Mot. at 21-22; Opp. at 8-12.[26] Plaintiffs instead cite cases that rely on a narrow exception to that general rule, which states:

> In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.

Restatement (Second) of Torts § 821C(1).[27] However, this exception is inapplicable to the State

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[23] At a minimum, Plaintiffs' proposed interpretation of Arkansas' litter management plans as "guidance documents" must be rejected. Arkansas law does not contain any of the general provisions relied upon by Plaintiffs under Oklahoma law, *see* Mot. at 20 n.20; Opp. at 22-23, nor do the plans caution that compliance with the specific instructions therein could still result in a violation, *see, e.g.*, Mot. Ex. 17 at 8 ("The contents of this document are *legally binding and must be implemented* through farm practices and procedures.") (emphasis added). Plaintiffs have identified no legal basis to interpret the Arkansas regulations and litter management plans as anything other than state authorization to perform the activity. Accordingly, summary judgment should be granted against Plaintiffs' claims arising from conduct in Arkansas.

[24] *See* Mot. at 4 ¶8, 19-20; Dkt. No. 2183 at 18-19 ¶39 n.77. Again, Plaintiffs attempt to shift the burden to Defendants on this point, *see* Opp. at 24, absent any basis to do so, *see supra* at 1 n.2.

[25] *See* Mot. at 17-20, *see, e.g., Carson Harbor Village, Ltd. v. Unocal Corp.*, 990 F. Supp. 1188, 1197 (C.D. Cal. 1997) (dismissing public nuisance claim where "Plaintiff's evidence … [fell] considerably short of meeting its burden on summary judgment that … Defendants violated either of the [public water utility] permits" authorizing the conduct), *aff'd by* 270 F.3d 863, 870 (9th Cir. 2001) (*en banc*).

[26] Plaintiffs repeated reference to cases premised upon claims other than public nuisance are irrelevant to this analysis. *See* Opp. at 8-10 (citing *inter alia State ex rel. Pollution Control Coordinating Bd. v. Kerr-McGee Corp.*, 619 P.2d 858, 861 (Okla. 1980)).

[27] While Plaintiffs do not expressly reference § 821C(1), it constitutes the basis for each case cited permitting recovery of damages by a government entity for a public nuisance. *See, e.g., New Mexico*, 335 F. Supp.2d at 1239-1241; *Mathes*, 2008 U.S. Dist. LEXIS 90087, *28-33; *but see Selma Pressure*, 221 Cal. App. 3d at 1614-16 (relying exclusively on California state statute).

of Oklahoma's present claim. Neither Oklahoma nor Arkansas has recognized this exception as it applies to government entities. While some jurisdictions have found that this exception applies to both private and public entities, *see supra* at 7 n.27, the majority are either silent on the issue or have interpreted it to apply only to *private* individuals' actions for public nuisance.[28] Oklahoma's statutory scheme supports this latter interpretation, as it expressly distinguishes the remedies available to public and private litigants in the same manner.[29] Moreover, this interpretation furthers the purpose of the long-standing common law rule by ensuring that the remedy in a government or *parens patriae* public nuisance action is used to abate or clean-up the nuisance—rather than for some wholly unrelated purpose (*i.e.* building new highways or paying contingency fee awards). Plaintiffs do not identify a single instance under Oklahoma or Arkansas law in which a public entity has been permitted to recover damages in such an action.

Finally, even if the exception were to apply, Plaintiffs cannot demonstrate that the State of Oklahoma has "suffered harm of a kind different from that suffered by other members of the public" on the basis of the present claim. Restatement (Second) of Torts § 821C(1).[30] Plaintiffs

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[28] *See, e.g., In re Lead Paint Litig.*, 924 A.2d at 498-99 ("[T]here is no right either historically, or through the [Restatement's] formulation, for the public entity to collect money damages in general. Rather, there is only a private plaintiff's right to recover damages through an action arising from a special injury.").

[29] *See* Mot. at 22-23; *see, e.g.*, 27A Okla. Stat. § 2-3-506(A) ("Nothing contained in this Code shall be construed as … as estopping *the state*, or *any municipality* or *person* in the exercise of their rights under the common law *to suppress nuisances or to abate pollution*. Nothing in this Code shall in any way impair or affect *a person's right to recover damages* for pollution.") (emphasis added). Plaintiffs' contrary interpretation of Oklahoma's statutory scheme is not persuasive. *Compare* Opp. at 11-12, *with* Mot. at 22-23. The phrase "civil action" in 50 Okla. Stat. § 8 is neither "redundant" nor "meaningless." Opp. at 12. Rather, the statute is consistent with the common law rule described herein, which authorizes civil actions by private individuals and public entities for claims of both private and public nuisance, but limits the remedies available to the government in the latter actions.

[30] *See People of the State of Illinois v. City of Milwaukee*, 731 F.2d 403, 415 (7th Cir. 1984) (state cannot recover damages for public nuisance because it had not suffered injury resulting from dumping of raw sewage into public waters of Lake Michigan of a kind different from that suffered by the public), *cert. denied*, 469 U.S. 1196 (1985); *New Mexico*, 335 F. Supp. 2d at

have repeatedly asserted that their nuisance claim seeks to remedy injury to the "public welfare" and protect "public, not private rights." *See supra* at 3 n.9. On its own, neither Plaintiffs' alleged ownership of the waters nor its parens patriae interests in protecting the public welfare comprises sufficient basis for a "special injury," as Plaintiffs have not requested damages for any "harm" suffered that is "of a different kind from that suffered by other members of the public." Restatement (Second) of Torts § 821C(1). In the only opinion defining the type of "special injury" that may be suffered by a government entity, the District of New Mexico expressly limited such recovery to "pecuniary losses arising from existing and future response and remediation costs." *New Mexico*, 335 F. Supp. 2d at 1241.[31] As detailed in *Defendants' Joint Motion for Summary Judgment on Counts 6 & 10*, Dkt. No. 2055 at 19-20 n.18, Oklahoma has not incurred any such costs. Absent evidence of recoverable damages stemming from "some discrete 'special injury' to the State's interest apart from the injury to the public's interest [in the waters], Plaintiffs must be limited to equitable relief seeking the abatement of the claimed nuisance." *New Mexico*, 335 F. Supp. 2d at 1241.

D. The Free Public Services Doctrine Limits Any Recovery by Plaintiffs

Plaintiffs' contention that the Free Public Services Doctrine is limited to "'emergency' costs" is incorrect. Opp. at 24–25. The doctrine is grounded in separation of powers principles, which place the decision to fund public services within the purview of the legislature, not the

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1241 ("Absent proof of some discrete 'special injury' to the State's interest apart from the injury to the public's interest [in the waters], Plaintiffs must be limited to equitable relief seeking the abatement of the claimed nuisance.").

[31] Additionally, the District of New Mexico expressly prohibited recovery of the types of damages that Plaintiffs seek in this litigation. *See id.* at 1241 nn.119, 121 (prohibiting recovery of "[i]nterim loss of use or diminution of value" and "diminution of value to real estate … economic losses including loss of asset value, increased operating expenses, increased costs of personal protection from contaminated domestic water or the threat of contaminated domestic water, loss of water quality or quantity, loss or enjoyment of real property," among others).

courts. *See* Mot. at 23-25.[32] The nature of the public service rendered "should make no substantive difference to the analysis." *Walker County*, 643 S.E.2d at 328. Numerous courts have applied the Free Public Services Doctrine to non-emergency public services,[33] and no limitation on the broad applicability of the doctrine has ever been recognized by the courts.[34]

V. Plaintiffs' Federal Common Law Nuisance Claim (Count 5) Should Be Dismissed

Plaintiffs attempt to sustain their federal common law nuisance claim by asserting that "[i]n fashioning federal common law, courts … should apply common law doctrines best suited to the task at hand." Opp. at 14. But, this statement merely supports Defendants' contention that the well-established principles of state common law addressed herein should apply to Plaintiffs' federal common law claim. *See* Mot. at 25 (citing *inter alia FDIC v. Assoc. Nursery Systems, Inc.*, 948 F.2d 233, 236 (6th Cir. 1991) ("[courts] will apply general principles of common law, state law to the extent it is consistent with general principles of federal common law")). Plaintiffs have done nothing to show that these general principles of state law are inconsistent with the federal common law of nuisance, nor identified any alternative standard to apply.[35] As a result, summary judgment on Count 5 is warranted in tandem with Count 4.

CONCLUSION

Summary judgment should be granted in whole or in part with respect to Counts 4 & 5.

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[32] *See United States v. Standard Oil*, 332 U.S. 301, 316 (1947); *Walker County v. Tri-State Crematory*, 643 S.E.2d 324, 328 (Ga. Ct. App. 2007).

[33] *See, e.g., D.C. v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144 (Ill. 2004); *Walker County*, 643 S.E.2d at 328.

[34] *See City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (cost of protecting public from "safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor"); *City of Chicago*, 821 N.E.2d at 1144 ("public expenditures made in the performance of governmental functions are not recoverable in tort"); *Koch v. Con. Edison Co. of N.Y., Inc.*, 468 N.E.2d 1, 8 (N.Y. 1984) (same).

[35] Plaintiffs' citations to cases involving jurisdictional considerations are not on point. *See* Opp. at 15. Further, these cases merely re-articulate, in dicta, the same common law standard that limits recovery of damages in a public nuisance action. *See id.*; *supra* at 7-9.

Respectfully submitted,

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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